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80-1424

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No._____

MARCELO MANUEL CANTERA-DUYOS, et al,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HENRY GONZALEZ, ESQ.
620 Madison Street
Suite 1A
Tampa, Florida 33602

QUESTION PRESENTED

WHETHER THE PROSECUTING ATTORNEY'S COMMENT DURING CLOSING ARGUMENT ON THE DEFENDANT'S FAILURE TO TESTIFY CONSTITUTED PLAIN ERROR.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, MARCELO MANUEL CANTERA-DUYOS, respectfully prays that a writ of certiorari issue to review the decision and opinion of the United States Court of Appeals for the Fifth Circuit entered on November 26, 1980. The Fifth Circuit's opinion affirmed judgments of conviction entered by the United States District Court for the Middle District of Florida in a criminal prosecution brought by the United States against the petitioner, who was charged along with twelve (12) other defendants in a two count indictment. Petitioner was charged in Count 1 with conspiracy to import marijuana and Count 2 with importation of marijuana.

OPINION BELOW

The November 26, 1980, opinion of the United States Court of Appeals for the Fifth Circuit is not reported. A copy of the slip opinion is attached hereto.

A petition for rehearing was filed on December 9, 1980, and said petition was denied on December 29, 1980. A copy of said denial is attached hereto.

JURISDICTION

The decision of the Court of Appeals, affirming the trial court's judgment of conviction was entered on November 26, 1980.

The decision of the Court of Appeals on petition for rehearing was entered on December 29, 1980.

This petition for certiorari is filed within sixty (60) days of the lower court's decision. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

WHETHER THE PROSECUTING ATTORNEY'S COMMENT DURING CLOSING ARGUMENT ON THE DEFENDANT'S FAILURE TO TESTIFY CONSTITUTED PLAIN ERROR.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment, of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

The petitioner was the defendant in a criminal prosecution instituted in the United States District Court for the Middle District of Florida. Petitioner was found guilty by a jury of conspiracy to import marijuana, in violation of Sections 952(a), 960(a)(1) and 963, Title 21, United States Code as to Count 1 of the indictment and with importation of marijuana, in violation of Sections 960(a)(3) and 959(2), Title 21, United States Code and Section 2, Title 18, United States Code as to Count 2.

The Petitioner, MARCELO MANUEL CANTERA-DUYOS, was named in the two counts of a two count indictment. The indictment included twelve other defendants. Count 1 charged all defendants with conspiracy to import marijuana and Count 2 charged all defendants with importation of marijuana.

Objection and motion for mistrial was made during the closing argument of Government counsel concerning the following underlined statement by the Government:

> "Ladies and gentlemen, under the facts and circumstances in this case it isn't, because the Judge is going to instruct you in detail—and you'll have the instructions to look at—he is going to instruct you what coercion is as a matter of law. And they haven't — Mr. Comacho hasn't even come close to the essential elements that are required under coercion."
>
> "In order to excuse an act that would otherwise be criminal, the intimidation or coercion must be present and immediate"—"immediate" is an important word — "and must be of such a nature as to induce a reasonable and well-founded fear of death or serious bodily injury to one's self or another; and there must be no reasonable opportunity to escape the coercion without participating in the crime."
>
> "And, ladies and gentlemen, you'll have that instruction. But this instruction applies only to the defendant Com-

acho. The instruction you get is the theory of the defendant Juan Calixto-Comacho in this case. This instruction applies only to Mr. Comacho and none of the other defendant's *because none of the other defendants have established through any testimony at all that they were threatened by death or serious bodily injury.*"

"And that's the instruction you're going to get. And this instruction applies only to Mr. Comacho, and listen carefully while the Court instructs you on that."

"MR. ALVAREZ: Your Honor, I hate to interrupt Mr. Lund, but may we approach the bench for a second, Your Honor?"

"THE COURT: Well, you object to counsel's argument, Mr. Alvarez?"

"MR. ALVAREZ: Yes. I would like to state my grounds not in the presence of the jury, with the Court's permission."

"MR. LUND: Your Honor, I would object to that. He can do it at —"

"THE COURT: Well, the record will show you have made your objection, and you may amplify it at the first opportunity out of the presence of the jury, Mr. Alvarez."

"MR. ALVAREZ: Thank you, your Honor."

"THE COURT: I will say to the jury, however, at this point of my own volition, with respect to counsel's last argument concerning evidence produced by defendants, of course, as I have previously instructed the jury and will again, it is never the burden or obligation of any defendant in a criminal case to call any witnesses or produce any evidence at all. I do not understand counsel to suggest otherwise. But to the extent it might have sounded as though he was, it should be disregarded altogether."

"MR. LUND: Yes, your Honor. I entirely agree with that, Your Honor."

Said objection and motion for mistrial was considered joined in by all other counsel (Vol. 11, pp. E-63; App. P. A-38).

On November 2, 1978, the District Court adjudicated the defendant, MARCELO MANUEL CANTERA-DUYOS, guilty of both counts and sentenced him to a period of imprisonment of four and one-half (4-½) years; in addition a parole term of seven (7) years on Count 2. The sentences are to run concurrently.

The Appellant, MARCELO MANUEL CANTERA-DUYOS, has duly filed his Notice of Appeal to the Fifth Circuit Court of Appeals to review the judgment of conviction and sentence of the District Court. The Fifth Circuit Court of Appeals affirmed the conviction and sentence on November 26, 1980, and petition for rehearing was filed on December 9, 1980 and denied on December 29, 1980.

REASONS FOR GRANTING THE WRIT

THE PROSECUTING ATTORNEY'S COMMENTS DURING CLOSING ARGUMENT, ON THE DEFENDANT'S FAILURE TO TESTIFY CONSTITUTED PLAIN AND REVERSIBLE ERROR AS A VIOLATION OF THE SELF-INCRIMINATION CLAUSE OF THE FIFTH AMENDMENT.

Under both the Fifth Amendment to the United States Constitution and 18 U.S.C. §3481, it is clear that no comment is permissible on a defendant's failure to testify. *Stewart v. United States*, 366 U.S. 1, 81 S.Ct. 941, 6 L.Ed.2d 84 (1961); *Wilson v. United States*, 149 U.S. 60, 13 S.Ct. 765, 37 L.Ed. 650 (1893); *DeLuna v. United States*, 308 F.2d 140, 1 A.L.R. 3d 969 (5th Cir. 1962). Such a comment is equally forbidden even though it is indirect. *Benham v. United States*, 215 F.2d 472 (5th Cir. 1954); *DeMayo v. United States*, 32 F.2d 472 (8th Cir. 1929). *Samuel's v. United States*, 398 F.2d 964, 966 (5th Cir. 1968), cert. denied 393 U.S. 1021 (1968).

The Fifth Circuit Court of Appeals in *United States v. White*, 444 F.2d 1274, 1278 (5th Cir. 1971), cert. denied 404 U.S. 949 (1971) has laid out the test in determining whether remarks made by a prosecutor are error:

> The test in determining whether such a transgression has occurred is whether the remark was manifestly intended or was "of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States v. Wilson*, 500 F.2d 715 (5th Cir. 1974).

Even at the outset, the Court felt it was a direct comment on the Petitioner's failure to testify.

> THE COURT: Well, you'll sure have your opportunity now Mr. Lund. That is a direct comment, is it not, upon the failure of other defendants to testify?

and again:

> THE COURT: What you said was "because none of the other defendants have established through any testimony at all that they were threatened...

and again:

> THE COURT: You said "because none of the other defendants have established through any testimony...

and again:

> THE COURT: But that's not what you said. What you said was that "none of the other defendants have established" ...What you told the jury was "that none of these other defendants have established". And I don't know what those common, ordinary words mean except "none of these defendants offered any evidence".

and again:

> THE COURT: Exactly. And that's the other aspect of the

> plain error in it. It's not their duty to establish it. It's the duty of the Government to negate it in terms of proving willingness. There is nothing in that instruction that suggests that the defendant has the burden of proving anything.

and again:

> THE COURT: I understand that Mr. Lund. But that's not what you told the jury. You told the jury they weren't entitled to the benefit of the instruction because none of them had established through any testimony at all.

As can be seen from the record, there is no question that the remarks made by the prosecutor were "of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify in his own behalf." The remark here made does meet that test as set out in *White* and *Wilson*, supra.

As to the test stated in *White*, dealing with the intent of the prosecutor, the prosecutor, in the instant case, stated that his intent was to the defense of coercion which is an affirmative defense, the Court then countered by stating:

> THE COURT: Oh, no, Mr. Lund. There is no such thing as an affirmative defense in a criminal case.

The Court went further:

> THE COURT: Mr. Lund, you can't do any such thing. If you will look, for example, at the notes of Devitt and Blackmar which you have cited in your alternative requested instruction, the former instruction was recently amended in that work in order to eliminate language previously appearing there, suggesting that the defendant might have a burden of proving anything. Even entrapment or insanity or alibi are not affirmative defenses. And the defendant does never have the burden of proving anything.

The Petitioner, MARCELO MANUEL CANTERA-DUYOS, contends that the direct comment made by the Government as to the defendant not testifying and establishing certain facts in his defense lead the jury to the only conclusion that it was incumbent upon all thirteen (13) defendants to prove their innocence; this situation cannot be cured by a cautionary instruction. *Griffin v. California*, 390 U.S. 609, 612 (1965).

The Trial Court even felt this way in his comments to the prosecutor.

> . . .and the defendant does never have the burden of proving anything.

And by the Court's question to all defense counsel after the motion for mistrial was made:

> THE COURT: Does any defendant opt out of that motion?

After the discussion between the Court and the Government, court recessed and upon re-adjourning, the Court made the following statement concerning the pending motion for mistrial.

Petitioner submits that the prosecutor's obviously erroneous belief in "affirmative defenses", or in his understanding of the ways in which the need for defense instructions arises, is the reason the improper remark was made. Thus, the remark was not a slip of the tongue; it was based on the very mistake of law that is proscribed and prohibited in the above-cited cases.

CONCLUSION

In view of the vital importance of the question presented and the considerations set forth above, this Court must grant this petition for writ of certiorari.

HENRY GONZALEZ
620 Madison Street
Suite 1A
Tampa, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above and foregoing has been furnished by mail to the Office of the Solicitor General, Room 5614, United States Department of Justice, Washington, D. C. 20530, this 27 day of January, 1981.

HENRY GONZALEZ
620 Madison Street
Suite 1A
Tampa, Florida 33602

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-5544

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRANCISCO CAICEDO-ASPRILLA, ANTONIO BARRIOS-HOYOS, JUAN CALIXTO-COMACHO, JUAN CARLOS CINOTTO-PANTUSO, THOMAS MIRANDA-BARRIOS, CHRISTOBEL FERNANDEZ-GOMEZ, WASHINGTON ARCHIBALD-ROBINSON, GUILLERMO GONZALES, WILFRIDO CARFARZUZA-CORTINA, DELIO DIAZ-LOPEZ, JAIME ALVAREZ-HERRERA, CESAR ZUNIGA-LOPEZ and MARCELO MANUEL CANTERA-DUYOS,
Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING
(December 29, 1980)

Before WISDOM, TJOFLAT and REAVLEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause on behalf of appellant Marcello Manuel Cantera-Duyos, be and the same is hereby.

Denied.

ENTERED FOR THE COURT:

United States Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
FRANCISCO CAICEDO-ASPRILLA, ANTONIO BARRIOS-HOYOS, JUAN CALIXTO-COMACHO, JUAN CARLOS CINOTTO-PANTUSO, THOMAS MIRANDA-BARRIOS, CRISTOBAL FERNANDEZ-GOMEZ, WASHINGTON ARCHIBALD-ROBINSON, GUILLERMO GONZALES, WILFRIDO CARFARZUZA-CORTINA, DELIO DIAZ-LOPEZ, JAIME ALVAREZ-HERRERA, CESAR ZUNIGA-LOPEZ and MARCELO MANUEL CANTERA-DUYOS,
Defendants-Appellants.

No. 78-5544.

United States Court of Appeals,
Fifth Circuit.

Nov. 26, 1980.

Defendants were convicted in the United States District Court for the Middle District of Florida, Wm. Terrell Hodges, J., of conspiring to import marijuana into the United States and for distributing marijuana with knowledge that it would be unlawfully imported into the United States, and they appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) trial judge properly denied motions for recusal because alleged bias was judicial rather than personal; (2) District Court had jurisdiction even though defendants' acts may have occurred outside territorial limits of the United States; (3) evidence was sufficient to sustain defendants' convictions; (4) search and seizure of ship on which the marijuana was found did not violate the Fourth Amendment; (5) even if pretrial photograph displays were impermissibly suggestive, witness' in-court identifications were not impermissibly tainted; and (6) prosecutor's comment was not intended as a comment on defendants' failure to take the stand.

Affirmed.

1. Judges 49(2)

In prosecution for conspiring to import marijuana and for distributing marijuana with knowledge that it would be unlaw-

fully imported into the United States, trial judge did not err in denying defendants' motions for recusal on basis of comment made by judge in a previous marijuana smuggling case to effect that he would deal as sternly as the law would permit with those caught importing narcotics since the alleged bias was judicial rather than personal. 28 U.S.C.A. §144.

2. Criminal Law 97(3)

In prosecution for conspiring to import marijuana into the United States and for distributing marijuana with knowledge that it would be unlawfully imported into the United States arising from seizure of ship in Gulf of Mexico, no evidence was presented to establish ship's claimed Panamanian registry to support defendants' claim that seizure of the ship was in violation of a treaty between the United States and Panama such as would have deprived district court of subject matter jurisdiction. Convention with Panama, 43 Stat. 1875.

3. Conspiracy 28(3)

Acts of conspiring to import marijuana and distributing marijuana knowing that it would be unlawfully imported into the United States, even though they may have occurred outside territorial limits of the United States, clearly had effects within United States territory, including territory over which district court had jurisdiction, and thus jurisdiction was proper. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 1002(a), 1009(2), 1013, 21 U.S.C.A. §§ 952(a), 959(2), 963.

4. Conspiracy 23

To prove a criminal conspiracy, the Government must show that there was an agreement among conspirators to commit an offense against the United States, accompanied by an overt act by one of the conspirators in furtherance of that agreement.

5. Conspiracy 47(1)

Although circumstantial evidence may be used to prove a conspiracy without ever showing the existence of any formal agreement, there must be proof beyond a reasonable doubt that a conspiracy existed, that the accused knew of it, and that he

intended to join or associate himself with objectives of the conspiracy.

6. Conspiracy 47(12)

Evidence was sufficient to convict each defendant arrested aboard ship seized in Gulf of Mexico of conspiring to import marijuana into the United States and for distributing marijuana with knowledge that it would be unlawfully imported into the United States. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 1002(a), 1009(2), 1013, 21 U.S.C.A. §§ 952(a), 959(2), 963.

7. Shipping 9

Where the Coast Guard knew that a described ship about 50 miles out into the Gulf of Mexico was a source of marijuana, spotted a ship matching such description flying no flag and attempting to avoid identification, monitored a suspicious radio broadcast when closing in on the ship, noticed items being thrown overboard, and, after boarding, encountered strong odor of marijuana and saw it strewn about the deck, they had probable cause to search the ship, including crew's quarters, even though the ship was in international waters when seized. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 1002(a), 1009(2), 1013, 21 U.S.C.A. §§ 952(a), 959(2), 963; U.S.C.A.Const. Amend. 4; 14 U.S.C.A. § 89(a).

8. Criminal Law 394.4(1)

Even if search and seizure of ship in Gulf of Mexico had violated the United States—Panamanian treaty, the Fourth Amendment would not have rendered evidence seized inadmissible in federal criminal prosecution. U.S.C.A.Const. Amend. 4; 14 U.S.C.A. § 89(a); Convention with Panama, 43 Stat. 1875.

9. Criminal Law 339.10(2)

Convictions based on eyewitness identification at trial following pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. U.S.C.A. Const. Amend. 5.

10. Criminal Law 339.10(2)

To be constitutionally offensive, allegedly impermissible suggestivity of identification procedure must have a nexus with purpose or probative value of questioned testimony; a photograph display may very well be inappropriately suggestive yet not run afoul of constitutional guidelines when what it suggests is uncontested or not closely linked to purpose or probative value of testimony derived from the offensive procedure. U.S.C.A.Const. Amend. 5.

11. Criminal Law 339.9(1)

Even if photographs in identification lineup were inappropriately suggestive of identity of defendants who were charged with conspiring to import marijuana and distributing marijuana with knowledge that it would be unlawfully imported and who were arrested on board ship seized in Gulf of Mexico, witness' in-court identifications given to show roles of various defendants were not impermissibly tainted where it was uncontested that marijuana was off-loaded from the ship and that each of the defendants was a member of the ship's crew and was on board during the off-loading, and thus there was an insignificant nexus between what may have been suggested to the witness and purpose and probative value of his testimony. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 1002(a), 1009(2), 1013, 21 U.S.C.A. §§ 952(a), 959(2), 963; U.S.C.A.Const. Amend. 5.

12. Criminal Law 721(1), 1171.5

Remarks about a defendant's failure to take the stand in his own defense constitute reversible error.

13. Criminal Law 1171.5

Test in determining whether a remark on a defendant's failure to testify constitutes reversible error is whether the remark was manifestly intended or was of such a character that jury would naturally and necessarily take it to be a comment on failure of defendant to testify.

14. Criminal Law 730(10)

Comment of prosecutor, taken in context and in light of

court's cautionary instruction, that coercion defense in conspiracy prosecution was available only to one of the defendants "because none of the other defendants have established through any testimony at all that they were threatened by death or serious bodily injury" did not constitute an impermissible comment on such defendants' failure to take the stand such as would have required reversal of defendants' convictions.

15. Criminal Law 814(8)

Although a defendant has no duty to present evidence to establish coercion as a legal defense to criminal charges, there must be some evidence in record presenting essential elements of that defense, with respect to each defendant seeking to rely on it, before a trial court may instruct jury on availability to individual defendants of that defense.

16. Criminal Law 1037.1(2)

Taken in context, prosecutor's argument to jury that charges against defendant were not brought without having a basis in fact did not constitute plain error such as would have allowed the Court of Appeals to reverse after no objection had been raised to the comment during trial.

Appeals from the United States District Court for the Middle District of Florida.

Before WISDOM, TJOFLAT and REAVLEY, Circuit Judges.

TJOFLAT, Circuit Judge:

The thirteen defendants in this case appeal their convictions for conspiring to import marijuana into the United States, and for distributing marijuana with knowledge that it would be unlawfully imported into the United States. 21 U.S.C. §§ 952(a), 959(2), 963 (1976). They assert numerous grounds for reversal: (1) the trial judge was disqualified to try the case and should have recused himself; (2) the district court lacked subject matter jurisdiction; (3) the evidence is insufficient to sustain the convictions; (4) the marijuana admitted into evidence at trial was seized in violation of the defendants' fourth amendment

rights and should have been suppressed; (5) tainted in-court identifications of some of the defendants violated the fifth amendment; and (6) the prosecutor improperly commented during closing argument on the failure of some of the defendants to take the stand and testify. We find no reversible error and affirm.

I

Late in the evening of April 13, 1978, the United States Coast Guard boarded a 30 foot Chris Craft power boat, the MERMAID, in the inland waters of Lee County, Florida, and discovered the residue from a cargo of marijuana. The three occupants of the boat were placed under arrest and turned over to deputies of the Lee County Sheriff's Office. One of the occupants, Jerry Lee Sylvester, confessed that he had gotten the marijuana from a mother ship located 45 to 55 miles out in the Gulf of Mexico, off the tip of Sanibel Island. The ship was described by Sylvester as being 70 to 80 feet long, with a forward cabin and a large aft hold; he described its crew as Colombian.

Ensign John Holmes, the Duty Agent at the Coast Guard Intelligence Office in Miami, was advised of the marijuana seizure, but not of the contents of Sylvester's statement to the Lee County Sheriff's Office. Holmes promptly began coordinating efforts to determine whether the power boat had acquired the marijuana from a large vessel in the Gulf. A Coast Guard helicopter pilot flying a routine fisheries patrol spotted the ALBAZUL, a 75-foot fishing vessel with white and blue trim, a forward cabin and large aft hold, anchored approximately 52 miles off the west coast of Florida. The vessel looked suspicious since it was not rigged for fishing, and five persons were on deck at a time when fishing boat crews normally sleep. Furthermore, the vessel flew no flag. When the pilot made two low passes in an attempt to identify it, the ALBAZUL got underway at high speed, overrunning its anchor. The pilot radioed an account of this activity to Ensign Holmes.

Ensign Holmes immediately contacted the Customs Service in Tampa and was informed of Sylvester's confession to the Lee County Sheriff's deputies. Holmes requested Customs to obtain a more detailed description of the mother ship from Sylvester. This was done and Holmes was advised that the mother ship was a fishing vessel with white and blue trim and two booms. Because this description matched the one given by the helicop-

ter pilot, Holmes ordered the Coast Guard cutter POINT SWIFT to the area of the ALBAZUL. Meanwhile, a Coast Guard fixed wing aircraft searched a 65 by 35 mile area around the ALBAZUL and discovered no other vessel that fit its description.

At approximately 3:45 p.m. on April 14, the POINT SWIFT made visual contact with the ALBAZUL and hailed the vessel. A few minutes later, the POINT SWIFT monitored a Spanish-language radio report which, it assumed, emanated from the ALBAZUL. The speaker indicated that the Coast Guard was following his vessel, that those aboard his vessel had been unable to move anything because of the tight surveillance, and that he had not received any instructions from the "head man" to discard anything. At 4:35 p.m. the crew of the POINT SWIFT observed items from the ALBAZUL being thrown overboard. The POINT SWIFT immediately notified the ALBAZUL that it wished to board. As the POINT SWIFT pulled alongside and as the Coast Guardsmen prepared to board, Chief Turpin detected the smell of marijuana. Once aboard, Turpin was approached by the ALBAZUL's captain, appellant Calixto-Comacho, who asked Turpin, "What do you want, my marijuana?" Record, vol. 5 at 151, 162. The Coast Guardsmen subsequently discovered marijuana scattered on the ALBAZUL's deck, more than 200 bales of marijuana in its hold and additional marijuana scattered in the crew's quarters.

No documentation of the ship's registry was ever found. On the cabin the word "Panama" appeared beneath the name ALBAZUL, but another nameplate bearing "MARINER, TAMPA, FLORIDA" was discovered elsewhere.

At trial, the Government's proof indicated that the defendants were involved in a sophisticated marijuana smuggling operation. Sylvester testified that he had been given detailed plans and code names to aid him in his rendevous with the ALBAZUL and that he was to be paid $120,000 for smuggling 6000 pounds of marijuana into the West Coast of Florida. He identified appellants Calixto-Comacho and Cantera-Duyos as those in charge of the ALBAZUL; they were the ones with whom he dealt and whom he observed giving the orders to the ship's crew.

Two of the thirteen defendants, Calixto-Comacho and Diaz-Lopez, took the stand in their own defense. Calixto-Com-

acho testified that he was forced to participate in the venture because he owed money to those backing the smuggling operation, and they were threatening to kill his family. Diaz-Lopez, however, testified that he thought he was being hired as a crew member for a coffee freighter, and that he did not realize that the cargo was not coffee until they were at sea.

II

[1] Appellants argue that the trial judge was disqualified to try the case and should have granted their pretrial motion for recusal. Early in the proceedings they filed motions, with supporting affidavits, pursuant to 28 U.S.C. § 144 (1976), alleging that the judge was prejudiced against anyone, especially aliens, who engaged in narcotics smuggling. They cited a comment the judge made in a previous marijuana smuggling case to the effect that he would deal as sternly as the law would permit with those caught importing narcotics. We addressed this precise issue in *United States v. Serrano*, 607 F.2d 1145, 1149-51 (5th Cir. 1979), *cert. denied*, 445 U.S. 965, 100 S.Ct. 1655, 64 L.Ed.2d 241 (1980). There, relying on the comment cited here, the defendants claimed that this trial judge was biased and thus disqualified. We held that the judge properly denied the motions for recusal because the alleged bias was judicial rather than personal. Since the allegations presently before us suggest no different source of bias, *Serrano* controls, and we must hold that the judge's decision to proceed to trial in this case was not error.

III

[2] Appellants claim that the seizure of the ALBAZUL was in violation of a treaty between the United States and Panama, 43 Stat. 1875 (1924), and that the district court therefore lacked subject matter jurisdiction. We need not determine whether a violation of the treaty precluded the district court from exercising jurisdiction in this case. The ALBAZUL flew no flag and had no documentation indicating its registry. No evidence was ever presented to establish its claimed Panamanian registry. In short, there is no support in this record for the appellants' jurisdictional attack.

[3] Appellant Zuniga-Lopez questions the district court's power to try this case on another ground. He argues that the

criminal statutes under which he and the others were charged have no extraterritorial application and therefore could not reach conduct engaged in by them 50 miles out in the Gulf of Mexico. We have previously entertained this argument and have rejected it. The defendants were tried for conspiring to import marijuana and for distributing marijuana knowing that it would be unlawfully imported into the United States. Even though these acts may have occurred outside the territorial limits of the United States, they clearly had effects within United States territory, including territory over which the court below has jurisdiction. Thus, jurisdiction was proper. *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980) (en banc); *United States v. Cadena*, 585 F.2d 1252, 1257 (5th Cir. 1978); *United States v. Winter*, 509 F.2d 975, 980-89 (5th Cir. 1975).

IV

The appellants contend that the evidence is insufficient to sustain their convictions. In evaluating this claim, we must view the evidence in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). The jurors' verdict will be upheld unless we can say that they, necessarily, must have entertained a reasonable doubt of the defendant's guilt. *United States v. Jackson*, 588 F.2d 1046, 1056 (5th Cir.), *cert. denied*, 442 U.S. 941, 99 S.Ct. 2882, 61 L.Ed.2d 310 (1979).

[4, 5] To prove a criminal conspiracy such as that charged in the first count of the indictment, the Government must show that there was an agreement among the conspirators to commit an offense against the United States, accompanied by an overt act by one of the conspirators in the furtherance of that agreement. *United States v. Barrera*, 547 F.2d 1250, 1256 (5th Cir. 1977). Although circumstantial evidence may be used to prove a conspiracy without ever showing the existence of any formal agreement, there must be proof beyond a reasonable doubt that a conspiracy existed, that the accused knew of it, and that he intended to join or associate himself with the objectives of the conspiracy. *United States v. Malatesta*, 590 F.2d 1379, 1381 (5th Cir.) (en banc), *cert. denied*, 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979).

[6] Here the evidence clearly demonstrated the conspiracy charged in the indictment. Sylvester's testimony, coupled with the tangible evidence introduced by the Government, revealed a

well-planned, furtive scheme to smuggle contraband into the United States. The appellants concede that the Government produced overwhelming evidence of a smuggling scheme, but claim that the prosecution's case was insufficient because it failed to establish that each of the defendants aboard the ALBAZUL participated in the scheme. We are satisfied that more than mere association with others involved in a criminal enterprise was shown as to every defendant in this case; there was ample proof that each defendant was aware of the ALBAZUL's smuggling mission and acted to carry that mission out. It is undisputed that all the defendants were found aboard the ALBAZUL and that the vessel was loaded with marijuana. The defendants, at the time of their arrest, had been on board approximately twelve days. Captain Calixto-Comacho testified that his codefendants had been hired to crew the 75-foot fishing vessel and had, in fact, sailed it from Columbia to the west coast of Florida. Each crewman was to be paid $1,000 for the trip, an inordinate amount for hauling coffee. Record, vol. 9 at 84, vol. 10 at 67.

The ALBAZUL was anchored off the west coast of Florida when the marijuana was offloaded onto the MERMAID. *Id.*, vol. 9 at 100. Most, if not all, of the defendants took part in the offloading. Three or four helped steady the MERMAID while several others formed a chain to pass the marijuana from the hold of the ALBAZUL onto the MERMAID. *Id.*, vol. 6 at 28, vol. 9 at 103. Although there was defense testimony that the crew's involvement was not voluntary, the jury was free to disregard it and to accept the prosecution's case, which, in our view, implicated each defendant in the conspiracy beyond a reasonable doubt. *See United States v. Cadena*, 585 F.2d 1252, 1265 (5th Cir. 1978). *See also United States v. Alfrey*, 620 F.2d 551, 555, 556 (5th Cir. 1980).

With regard to the substantive offense, distributing marijuana with knowledge that it would be unlawfully imported into the United States, the evidence showed conclusively that marijuana was brought from Columbia and distributed to Sylvester, aboard the MERMAID, for importation into this country. Some of the defendants may not have taken an active part in loading the marijuana onto the MERMAID; those who did not actively load, however, certainly aided and abetted that operation and were subject to conviction under 18 U.S.C. § 2 (1976). In sum, as to each of the defendants, the evidence was sufficient to carry the case to the jury on both counts of the indictment.

V

Appellants argue that the Coast Guard lacked statutory authority to seize the ALBAZUL on the high seas and that the seizure of the vessel and the search that followed violated the fourth amendment. Therefore, they argue, the marijuana introduced into evidence should have been suppressed.

[7] Our recent en banc decision in *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980) (en banc), puts this argument to rest. In *Williams*, the Coast Guard's authority to seize and search a foreign vessel on the high seas was questioned. We held that 14 U.S.C. § 89(a) (1976) provides statutory authority for the Coast Guard to seize a foreign vessel in international waters, and to search for contraband, if there are reasonable grounds for suspecting that the vessel is violating federal narcotics laws. *Id.*, 617 F.2d at 1075-77. We then proceeded to hold that such a seizure founded on reasonable grounds would be permissible under the fourth amendment. *Id.*, 617 F.2d at 1077-1084. Thus, the ALBAZUL's seizure did not contravene the fourth amendment if the Coast Guard had reasonable grounds to suspect that the ALBAZUL was being used in the furtherance of a conspiracy to import marijuana into the United States. Reasonable grounds for suspicion were clearly present in this case.

The Coast Guard knew that the MERMAID's source of marijuana supply was a mother ship about fifty miles out into the Gulf. The vessel Sylvester described was nearly identical to the one spotted by the Coast Guard helicopter pilot. Though a commercial fishing vessel, the boat exhibited few signs that it was engaged in fishing. Moreover, the vessel flew no flag and attempted to avoid identification. When, as it closed on the ALBAZUL, the cutter POINT SWIFT monitored a suspicious radio broadcast and then noticed items being thrown overboard, it was quite apparent that those aboard the ALBAZUL were in violation of federal narcotics laws. The Coast Guardsmen were thus authorized to seize and board the ALBAZUL pursuant to section 89(a). When, after boarding, they encountered the strong odor of marijuana and saw it strewn about the deck, they had probable cause to search the ship, including the crew's quarters. This probable cause plainly satisfied the reasonableness standard of the fourth amendment. *United States v. Williams*, 617 F.2d at 1084-1089.

[8] The appellants alternative claim that the seizure and search of the ALBAZUL was unreasonable because it violated the United States' treaty with Panama must be rejected on two grounds. First, as we pointed out in Part III *supra*, the appellants failed to establish that the ALBAZUL was of Panamanian registry; hence, United States-Panamanian treaty provisions are irrelevant to this case. Second, we have held that even if such a non-self-executing treaty were violated, the fourth amendment would not render the evidence seized by the Coast Guard inadmissible in a gederal criminal prosecution. *United States v. Williams*, 617 F.2d at 1089.

VI

Shortly following the defendants' arrests, Sylvester was asked to examine thirteen photographs, all of defendants, to see if he could pick out those in charge of the operations aboard the ALBAZUL. Sylvester singled out three of them. Sylvester saw the photographs a second time when he conferred with the prosecutors on the eve of trial.

Sylvester was one of the Government's prime witnesses. He had a history of drug smuggling and told how he had become involved with the ALBAZUL. Following the instructions of his accomplices ashore, Sylvester purchased the MERMAID and a CB radio and headed out into the Gulf to find the ALBAZUL. Using code names for the MERMAID and the ALBAZUL, Sylvester eventually made contact and, at 3:45 p.m. on April 12, 1978, drew alongside the mother ship. Sylvester had been given a slip of paper, called a "passport," that would indicate to the ALBAZUL that he was part of the smuggling organization and was to be trusted. Sylvester gave his passport to Calixto-Comacho, who appeared to be the ship's captain and apparently was the only one aboard who spoke English. Calixto-Comacho handed the passport to Cantera-Duyos, an older man, who checked it against a list maintained in the cabin. When Cantera-Duyos nodded affirmatively, the captain asked Sylvester how much marijuana he wanted.

The MERMAID stayed fast to the ALBAZUL for an hour and fifteen minutes. Sylvester had brought various supplies for the ALBAZUL and they were transferred to that vessel. Then Calixto-Comacho, Sylvester, Allen, and three Columbians from the ALBAZUL, all defendants, boarded the MERMAID to

receive the marijuana. The marijuana was handed from the ALBAZUL's hold to several of the defendants stationed on the ALBAZUL's deck, who passed it to those on the MERMAID. After the marijuana was loaded, the MERMAID received some gasoline and departed for the west coast of Florida.

During his lengthy direct examination, Sylvester identified, without objection, Calixto-Comacho, as the ALBAZUL's captain, and Cantera-Duyos, as the individual who checked the passport. Sylvester also pointed to several of the defendants who had had occasion to come aboard the MERMAID while it was tied up to the ALBAZUL. On cross-examination, several defense counsel challenged Sylvester on his identification of their clients, pointing out that shortly following their arrests he was shown a photograph display and had singled out from it only three defendants. Despite vigorous cross-examination, Sylvester stuck by his in-court identifications.

At the close of the Government's case-in-chief, those defendants whom Sylvester had identified moved to strike his identification testimony on the ground that the two pretrial photograph displays were impermissibly suggestive and thus rendered his in-court identifications impermissibly tainted.[1]

[9] A due process claim arises from the use of impermissibly suggestive pretrial identification procedures; such a claim may vitiate all evidence derived from those inappropriate procedures. "[D]ue process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *Moore v. Illinois*, 434 U.S. 220, 227, 98 S.Ct. 458, 464, 54 L.Ed.2d 424 (1977). At the core of this type of due process claim is the concern that an improper identification procedure will influence and therefore taint any subsequent identification of the same subject. The test in such situations has been enunciated as follows: "[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photo-

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1. Appellants' briefs indicate that they may also allege error on a related ground: denial of the sixth amendment right to counsel. This claim is based upon the Government's failure to provide for defense counsel's presence at the photo displays to Sylvester. This contention is meritless. *See United States v. Ash*, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973).

graphic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968).

[10] It follows, therefore, that under this test objectionable testimony is that linked to the impermissible suggestion. Thus, we must stress at the outset of our due process inquiry that to be constitutionally offensive, the allegedly impermissible suggestivity must have a nexus with the purpose or probative value of the questioned testimony. A photograph display may very well be inappropriately suggestive yet not run afoul of constitutional guideliness. This is so when what it suggests is uncontested or not closely linked to the purpose or probative value of the testimony derived from the offensive procedure.

Although we find it unnecessary to reach the question of whether the photographs were inappropriately suggestive of the identity of the defendants, and thus do not rule on that matter, we shall nevertheless assume, for the sake of argument, that they were. This is the defendants' contention. *See, e. g.*, Brief for Appellant Juan Carlos Cinotto-Pantuso at 33.

It is uncontested that Sylvester offloaded marijuana from the ALBAZUL. It is also uncontested that each of the defendants were members of the ALBAZUL's crew, were on board during the off-loading, and were found on board the ALBAZUL by the U.S. Coast Guard. If the photographs shown Sylvester suggested that the defendants were indeed the crew members of the ALBAZUL, the suggestion was harmless beyond question, as no-one has ever argued otherwise.

Sylvester's testimony was not elicited for the purpose of placing the defendants at the scene of the crime in the face of contentions that they might have been elsewhere, but rather for the purpose of recreating for the jury the roles that several of the defendants played in the crime. Record, vol. 6 at 22-28. The photograph displays were used to prepare Sylvester for this role-oriented testimony. Indeed, even appellants, in apparent self-contradiction, recognize that "the photopak presented to Sylvester was obviously intended primarily to obtain evidence for trial and *not* to identify or apprehend suspects. . ." Brief for Appellant Juan Carlos Cinotto-Pantuso at 30 (emphasis added). "It is obvious that the photopak was not used to further an in-

vestigation nor to help authorities to determine the identity of the suspects." *Id.* at 28. At no point does the record indicate that the photograph display was in any sense suggestive of the particular roles that each defendant played in the event, nor do the appellants argue that the Government tried to influence Sylvester in his determination of who played what role during the marijuana transfer.

[11] Thus, even if the presentation of the photographs was impermissibly suggestive of what has been conceded the identity of the defendants—it certainly was not suggestive of Sylvester's testimony. Because there is an insignificant nexus between what may have been suggested to Sylvester and the purpose and probative value of his testimony, the defendant's due process claim must be rejected.

VII

The final point of error arises from an allegedly improper comment on the failure of some of the defendants to take the stand in their defense made by the prosecutor during closing argument. This questioned comment arose while the prosecutor was discussing the defense raised by Calixto-Comacho that he had been coerced into participation in smuggling contraband. The prosecutor pointed out to the jury that the judge would instruct them that before coercion could rise to the level of a legal defense, it must be shown that the coercion was present and immediate, that it induced a well—founded fear of death or serious bodily injury to oneself or another, and that there was no reasonable opportunity for escape. The challenged comment followed:

> And, ladies and gentlemen, you'll have that instruction. But this instruction applies only to the defendant Comacho. The instruction you get is the theory of the defendant Juan Calixto-Comacho in this case. This instruction applies only to Mr. Comacho and none of the other defendants, because none of the other defendants have established through any testimony at all that they were threatened by death or serious bodily injury.
>
> And that's the instruction you're going to get. And this instruction applies only to Mr. Comacho, and listen carefully while the Court instructs you on that.

Record, vol. 11 at 40.

Counsel for one of the defendants then objected, and the judge, noting the objection, reminded the jury that it had been instructed, and would be instructed further, that a defendant has no obligation to produce any evidence. The judge stated that he did not understand the prosecutor to suggest otherwise, but that any suggestion to the contrary in the prosecutor's remarks should be disregarded. *Id.* at 41. The prosecutor indicated his complete agreement with the court's comment.

Later, outside the presence of the jury, other defendants joined the objection. They claimed that the trial court should have granted a mistrial since the prosecutor's remarks constituted an improper comment on their clients' failure to testify. After considering counsels' arguments on the matter, the trial court denied the motion for mistrial and submitted the case to the jury. Although he considered the remark improper, he ruled that, at worst, it was an indirect reference to the election of any defendant not to testify. *Id.* at 73.

[12, 13] Remarks about a defendant's failure to take the stand in his own defense constitute reversible error. *Griffin v. California*, 380 U.S. 609, 612, 85 S.Ct. 1229, 1232, 14 L.Ed.2d 106 (1965). In *United States v. White*, 444 F.2d 1274, 1278 (5th Cir.), *cert. denied*, 404 U.S. 949, 92 S.Ct. 300, 30 L.Ed.2d 266 (1971), this court set out the proper standard for analyzing whether comments are, in fact, remarks on a defendant's failure to testify:

> The test in determining whether such a transgression has occurred is whether the remark was manifestly intended or was "of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Samuels v. United States*, 398 F.2d 964 (5th Cir. 1968), cert. den. 393 U.S. 1021, 89 S.Ct. 630, 21 L.Ed.2d 566 (1969).

[14-16] In light of the context in which the prosecutor's remarks were made, we cannot say that they were intended, or that the jury would necessarily infer that they were intended, as a comment on the defendants' failure to take the stand. Although a defendant has no duty to present evidence to establish coercion as a legal defense to criminal charges, there must be

some evidence in the record presenting the essential elements of that defense, with respect to each defendant seeking to rely on it, before a trial court may instruct the jury on the availability to individual defendants of that defense. *See generally United States v. Bates*, 600 F.2d 505, 511-512 (5th Cir. 1979), *United States v. Furr*, 528 F.2d 578, 580 (5th Cir. 1976). Here the trial court had properly decided that the coercion defense would be available only for Calixto-Comacho, since the evidence was insufficient to instruct the jury on the availability of that defense to the other defendants. Record, vol. 11 at 11-12.[2] The prosecutor's comment was merely emphasizing that point. We do not view his comment, taken in context and in light of the court's cautionary instruction, as directed toward the defendants' exercise of their right to remain silent.[3]

For the foregoing reasons, the convictions are AFFIRMED.

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2. Diaz-Lopez's defense and apparently that of the other defendants, appeared to be that they had been "duped" into participation in the smuggling operation and that they did not participate in any overt acts after they discovered the true nature of the voyage. Record, vol. 11 at 12.
3. Appellants also allege that the prosecutor committed reversible error when, during his rebuttal closing argument, he responded to a defense counsel's argument that the prosecutor would be required to prosecute even if he were convinced that the defendants had been duped into the operation. The prosecutor then argued to the jury that charges were not brought without having a basis in fact. Appellants claim that this response suggested to the jury that the indictment carried with it a cloak of validity. No objection was raised to this comment during trial. Unless there is plain error, we cannot reverse. *Rotolo v. United States*, 404 F.2d 316, 317 (5th Cir. 1968). Here, taken in context, there clearly is no plain error.